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No. 08-1291

In The Supreme Court of the United States

ODIS TUCKER; VONNIE TUCKER; and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, political subdivision of the State of Tennessee; SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF SAVANNAH POLICE DEPARTMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Issues not raised, or developed in the argument in the court of appeals are waived and will not be considered by the Supreme Court. The Tuckers did not develop in their brief in the court below the issue of the standard of proof required for the recovery of compensatory damages under the Americans with Disabilities Act. Because the issue was not raised below, should the Petition for Writ of Certiorari be denied on this issue?

2. The Americans with Disabilities Act does not apply in the context of an in-the-field arrest before the scene is secure. Blake Tucker was arrested because he assaulted a police officer and a citizen, and committed disorderly conduct; his step-father, Odis Tucker, was arrested for attempting to interfere with the arrest. Under these circumstances were the officers required to accommodate the Tuckers' disabilities before securing the scene?

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OPINION BELOW

The opinion of the court of appeals is published at 539 F.3d 526 (6th Cir. 2008). The opinion of the district court granting the Savannah Police Department's motion for summary judgment is published at 443 F.Supp.2d 971 (W.D.Tenn. 2006).

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals was entered on August 29, 2008. The Petition for Rehearing En Banc was denied on January 16, 2009, and the Certiorari Petition was filed on April 16, 2009. Odis, Vonnie, and Blake Tucker invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOKED

The Tuckers have cited the applicable statutory and regulatory provisions involved in this case.

STATEMENT OF THE CASE

I. Introduction.

Blake and Odis Tucker[1] claim that their arrests by police officers of the City of Savannah, Tennessee, violated the Americans with Disabilities Act. 6th Cir. Joint Apx. pg. 14. Because the Tuckers are deaf and mute they are qualified individuals with a disability as defined by 42 U.S.C. §12131(2). They claim they were "in need of the services, programs and activities of law enforcement . . . of . . . the City of Savannah" and the City discriminated against them by failing to provide an effective means of communication. 6th Cir. Joint Apx. pgs. 14 and 17.

II. The police officers communicated effectively enough for the Tuckers to accomplish the purpose of the trip, i.e., to pick up Blake's wife and child.

Blake and Odis Tucker came to Savannah to pick up Lauren Tucker and Kayla Tucker, the minor child of Blake and Lauren. 6th Cir. Joint Apx. pg. 16. Lauren and Kayla had been visiting Lauren's mother, Donna Spears, in Savannah, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 973 (W.D.Tenn. 2006). Sometime after Blake and Odis Tucker arrived

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[1] Vonnie Tucker had no involvement with the City's officers and her lawsuit is only against Hardin County, Tennessee. *Tucker v. Hardin County,* 443 F.Supp.2d 971, 972 n. 3 (W.D.Tenn. 2006).

at Ms. Spears's home, one of the neighbors called the Savannah Police Department and Officers Mike Pope, John Sylvester, and T.J. Barker responded to the call. *Tucker v. Hardin County,* 443 F.Supp.2d at 973; 6th Cir. Joint Apx. pgs. 16; 43; 112-13; 145; and 150.

When Officer Pope arrived, he saw Blake and Odis using sign language. 6th Cir. Joint Apx. pgs. 113-14. Officer Pope then began using his pad and pen to communicate with Blake and Odis. Petition at pgs. 7-8. He asked if they had called the police and Blake responded that he did not know who called the police. 6th Cir. Joint Apx. pg. 114. Officer Pope then told Blake and Odis to wait while he tried to find out what was going on. Petition for Writ of Certiorari at pg. 8.

Donna Spears told Officer Pope that the Tuckers had come to pick up Lauren and the baby, but that Lauren did not want to go with them. 6th Cir. Joint Apx. pg. 114. Officer Pope separated Donna Spears from Blake and Odis by telling her to go in her house. 6th Cir. Joint Apx. pg. 114. This is standard procedure in a domestic case. 6th Cir. Joint Apx. pg. 146.

By communicating in writing Officer Pope learned that the Tuckers had come to Savannah to pick up Lauren and her baby, but Donna Spears would not let them leave. 6th Cir. Joint Apx. pgs. 114-15. Officer Pope then told the Tuckers to wait outside while he went in to talk with Donna Spears. 6th Cir. Joint Apx. pg. 115.

Officer Pope went inside with Donna Spears and her daughter, Lauren Tucker, to find out what was going on. 6th Cir. Joint Apx. pg. 115. Donna Spears repeated that Lauren did not want to leave with the Tuckers. 6th Cir. Joint Apx. pg. 116. At first, Lauren refused to communicate with Officer Pope. *Id.* Officer Pope continued trying to communicate with Lauren by writing. *Id.* He explained he could not help her if she would not communicate with him. *Id.* Lauren finally agreed to communicate with Officer Pope if her mother left the room. *Id.* at pgs. 116-17. Officer Pope then asked Mrs. Spears to leave and, after she left, Lauren began communicating with him. *Id.* at pg. 117. Lauren Tucker told Officer Pope that she wanted to leave with Blake and Odis. *Id.*; Petition at pg. 8. Officer Pope then told Ms. Spears that if her daughter wanted to leave, he could not stop her. 6th Cir. Joint Apx. at pg. 117.

Officer Pope, again using written communication, told the Tuckers that Lauren would be leaving with them. *Id.* at pgs. 118-19. The Tuckers understood that the purpose of the trip had been met. Petition at pgs. 8-9. The police officers walked with Lauren Tucker to the van. Donna Spears and her friend Judy Crotts also walked to the van. *Id.* Ms. Spears wanted to hold her granddaughter one final time before Kayla and Lauren left. After Ms. Spears held her granddaughter, Lauren began putting Kayla in her car-seat and at about the same time Blake attacked Judy Crotts.

III. Blake Tucker was arrested for assault, resisting arrest, and disorderly conduct; and Odis Tucker was arrested for interfering with police officers.

As Lauren was putting Kayla in the van, Officer Pope saw Blake Tucker swing his fist and hit Judy Crotts. 6th Cir. Joint Apx. pgs. 119-20 and 129-30. Officer Pope then pulled Donna Spears behind him and held up his hands indicating for Blake Tucker to stop. *Id.* at pg. 120. Blake then hit Officer Pope in the chest. *Id.* After struggling with the officers, Blake Tucker was taken to the ground, but he continued to resist by trying to prevent the officers from handcuffing him. *Id.* at pgs. 120-21. Officer Pope then struck Blake Tucker twice on the right shoulder to get control of his right hand. *Id.* at pgs. 120-21 and 151. During the time the officers were on the ground struggling with Blake, Odis Tucker approached the officers as if he might be about to interfere with the arrest. *Id.* at pgs. 121-23 and 127.

Blake was arrested and charged with assaulting Judy Crotts and Officer Pope, disorderly conduct, and resisting arrest. *Id.* at pgs. 138 and 154-61. He pleaded guilty to both assault charges and to disorderly conduct. *Id.* at pgs. 176-77. Odis Tucker was arrested and charged with interference with an officer, resisting arrest, and disorderly conduct. *Id.* at pgs. 138 and 162-67. The charges against Odis were dismissed by the state as part of the plea agreement with Blake Tucker.

REASONS FOR DENYING THE PETITION

I. The Tuckers waived the issue regarding the standard of proof for compensatory damages.

The district court noted that the Tuckers would have to prove intentional discrimination to recover compensatory damages. *Tucker v. Hardin County,* 443 F.Supp.2d at 973 (W.D.Tenn. 2006). The Tuckers take issue with intentional discrimination as the standard for recovery of compensatory damages under the Act. Petition at pg. 15.

The Tuckers knew the district court had concluded that proof of intentional discrimination was necessary to recover compensatory damages, but they did not raise this issue in the court of appeals. The closest they came to raising the issue was in their brief where they stated the following issue:

> As to the Plaintiffs' claims against the City of Savannah Police Department, what is the standard for evaluating an ADA claim of discrimination as to hearing and speech disabled persons and their rights to 'auxiliary aids' in the context of a police confrontation with them and other non-disabled member (sic) of the public

Brief of Appellants Odis Tucker, Vonnie Tucker and Blake Tucker, at pgs. 1-2.

To the extent this raised the issue, it did so only in a perfunctory way. Beyond this one-time mention of the standard, the Tuckers made no effort to develop

this argument. *Id.* The Tuckers' failure to develop this issue in their argument (*Id.* at pgs. 24-30 and 32-43) results in the issue being waived. *See Vallejo Piedrahita v. Mukasey,* 524 F.3d 142, 144-45 (1st Cir. 2008). Issues not raised in the court of appeals will not be addressed by the Supreme Court of the United States. *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Because the Tuckers did not raise or develop this issue in the court of appeals, their petition should be denied as to the correct standard for recovering compensatory damages.

II. The arrests were because of the commission of crimes and not "because of" or "solely because of" the Tuckers' disabilities.

The opinions below recognize that police officers are expected to react to the individuals and the changing circumstances they encounter. *Tucker v. Hardin County, et al.*, 539 F.3d 526, 536 (6th Cir. 2008); *Tucker v. Hardin County, et al.*, 443 F.Supp.2d 971, 975-76 (W.D.Tenn. 2006). The courts should not add to the often dangerous nature of police work by requiring that they measure their actions when making in-the-field arrests by the requirements of the Act before the scene is secure. The Act may apply in the context of some arrests, but not in the context of the arrests in this case in which the officers had not yet gained control of the situation. The Tuckers' conduct forced the officers to act to protect themselves and others.

A. Arrests made because an officer misperceives the effects of a disability may violate the Act.

Arrests made because an officer misperceives the effects of a disability such as a stroke, may violate the Act. *See, e.g., Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D.Ind. 1997). A determination as to whether the Act creates a cause of action under these circumstances is a fact specific determination.

B. If the injury results from the failure to accommodate a disability following an arrest unrelated to the disability, the Act may provide a cause of action.

What about the situation in which the officer makes an arrest not related to the disability and then the failure to accommodate the disability subsequent to the arrest causes an injury? Under these circumstances the injured person may have a cause of action under the Act. For example, transporting a wheelchair-bound arrestee in a van that lacks wheelchair restraints may establish a cause of action for injuries received. *See, e.g., Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). But these circumstances are different from the circumstances confronting the City's officers in this case. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

Also, the facts of this case distinguish it from the factual scenario discussed by the Tuckers at pg. 19 of their Petition. That factual scenario is more like

Center v. City of West Carrollton, 227 F.Supp.2d 863 (S.D.Ohio 2002). In *Center* the police did not call an interpreter to assist in interviewing a victim; and, despite the victim's lack of proficiency in English, the officer persisted in using written communications.

C. An officer's in-the-field arrest is not governed by the Act prior to the officer securing the scene.

But the facts of this case remove it from the scenarios discussed above. This case falls into a separate category, i.e., the arrest is not based on the disability, but rather on the Tuckers' independent criminal acts. In this case, the arrest was not based on the misperceived effects of the Tuckers' disabilities and the Tuckers were not injured because the officers failed to accommodate their disabilities after securing the scene. Furthermore, the communications preceding Blake's assault of Ms. Crotts were effective.

1. The police officers communicated effectively enough for Blake and Odis to receive the very thing they came for, i.e., Lauren and the baby.

This case consists of two parts: (1) before Blake Tucker assaulted Judy Crotts; and (2) after he assaulted Judy Crotts. If Blake Tucker had not assaulted Judy Crotts, the Tuckers would have been on their way to Alabama and no one would have claimed a failure to accommodate. Why? Because the

communications were effective. It was Blake Tucker's criminal conduct, not a lack of communication, that gave rise to this case.

Before the assault, the officers arrived on the scene and communicated with Blake, Odis, and Lauren in writing. 6th Cir. Joint Apx. at pgs. 114-17; Petition at pg. 8. The communications were effective enough that Lauren and the baby were preparing to leave with Blake and Odis. 6th Cir. Joint Apx. at pgs. 118-19. The Tuckers understood that Lauren and her daughter would be leaving with them. Petition at pgs. 8-9. After Ms. Spears held her granddaughter one last time, Blake Tucker assaulted Ms. Crotts and part 2 began.

2. Blake Tucker was arrested because he assaulted Judy Crotts and Officer Pope, he resisted arrest, and committed disorderly conduct.

Blake Tucker was arrested for assaulting a police officer and a citizen. He was also charged with disorderly conduct and resisting arrest. These charges did not result from the failure of the officers to call for an interpreter, but rather because Blake Tucker committed the crimes. The officers treated him like any non-disabled person who assaulted a citizen and a police officer.

a. The Tuckers misstate the facts in their petition regarding the assault.

In their Petition, Blake claims he did not assault Judy Crotts but merely "put his arm out to keep her from interfering and she fell back to the ground." Petition at pg. 9. He also claims the officers "hit him in the mouth with a gun chipping his tooth, and he was punched in the face three or four times." *Id.*

There is one problem with the Tuckers' recitation of the facts: It is wrong. Blake Tucker admitted he assaulted Ms. Crotts and Officer Pope, and that he committed disorderly conduct. 6th Cir. Joint Apx. pgs. 176-77. He cannot now approach this case as if he had not committed these crimes. The Tuckers also contradict themselves regarding the communications between Blake and the police. The Tuckers claim that after Blake's initial encounter with Officer Pope, there were no further written communications between Blake and the police. Petition at pg. 9. But on the next page the Tuckers say that Officer Pope communicated in writing with Blake after Lauren decided to leave with Blake. *Id.* at pg. 9.

b. Blake Tucker cannot deny he committed the crimes.

Not only is he prevented from denying he committed the crimes, but he is also prevented from relitigating these matters by claiming the officers used excessive force. Excessive force is an affirmative

defense to the charges of assault. Tenn. Code Ann. §39-11-611(e)(1)-(2). The conviction means that Blake Tucker did not have a self-defense justification. *See, Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999). It is too late for him to assume the role of victim.

Blake Tucker was arrested because he assaulted two persons and committed disorderly conduct. He was not arrested because of his disability. On the contrary, just before his criminal outburst the Tuckers were preparing to leave Tennessee and return to their home in Eastaboga, Alabama, with Lauren and the baby.

3. Odis Tucker was arrested because the officers reasonably believed he was about to interfere with the arrest of Blake.

Odis Tucker was not arrested because of his disability. He was arrested because he attempted to interfere with the officers as they struggled on the ground with Blake. 6th Cir. Joint Apx. pgs. 121; 123-27; 147; and 151-52. Officer Pope, who had already been assaulted by Blake, believed Odis Tucker was a threat to the officers when he approached them from behind. 6th Cir. Joint Apx. pgs. 123; 125; and 127. The officers had never dealt with Blake or Odis and were forced to make their decisions based on events occurring at the scene. 6th Cir. Joint Apx. pgs. 148; and 152.

4. Under these circumstances the officers had no duty to stop during the arrest and concern themselves with calling an interpreter.

It was based on these events that the officers arrested Blake and Odis. The officers were not under a duty to stop and determine whether they were complying with the Act before the scene was secure. "To require the officers to factor in whether their actions are going to comply with the [Act], in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and nearby civilians, would pose an unnecessary risk to innocents." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000). To do so would require "fulfillment of [the Act's] objective . . . at the expense of the safety of the general public." *Id.*

This is particularly true in this case. Blake Tucker had assaulted a bystander and a police officer, and he committed disorderly conduct which necessarily involves fighting or violent behavior. Tenn. Code Ann. §39-17-305(a)(1). His violent behavior made it necessary for the officers to gain control of the situation; the arrests were not because of the Tuckers' disabilities.

5. There is no conflict among the courts as to whether the Act applies in the context of an in-the-field arrest before the officers have secured the scene.

The Tuckers do not address the issue of whether the Act applies to arrests made under the circumstances of this case. Petition at pgs. 14-26. The Sixth Circuit's opinion in this case is in agreement with other courts that have decided this issue. *See, Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007); *Thompson v. Williamson County,* 219 F.3d 555 (6th Cir. 2000); *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1996); *Patrice v. Murphy*, 43 F.Supp.2d 1156 (W.D.Wash. 1999). It is unclear why the Tuckers did not raise as an issue whether this arrest is covered by the Act; but perhaps it is because the case law is to the contrary.

III. The "serious conflicts" among the circuits as to whether the effectiveness of the auxiliary aid is a question of law or fact need not be resolved in this case.

The Tuckers argue that the lower courts erred because the effectiveness of the aid is a question of fact. Petition at pgs. 21-25. But all questions of fact do not have to be resolved by the jury. If no reasonable jury could accept the Tuckers' factual claims, then the court does not have to adopt their version for purposes ruling on the motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The Tuckers claim that despite there being "numerous genuine issue (sic) of material fact" the Sixth Circuit decided that the accommodations were effective. Petition at pgs. 20-22. The Tuckers did not identify the genuine issues of material fact that the Sixth Circuit overlooked. *Id.* But the undisputed fact is that the communications between the officers and the Tuckers were effective. Ineffective communication did not disrupt their mission. Blake's assault on Judy Crotts was the disruption in the Tuckers achieving their stated purpose. A reasonable jury could not conclude otherwise. Therefore, the Sixth Circuit committed no error that could be remedied by this Court.

Because the Act does not apply to the arrest, this Court does not need to resolve the issue of whether the effectiveness of the communication is a question of law or fact.

CONCLUSION

The Tuckers never raised the issue of the standard of proof required for the recovery of compensatory damages under the Act. Perhaps it was raised in a perfunctory manner in the court of appeals but we really don't know because it was never developed in their argument. Issues that are not developed in the argument are normally considered waived because it is not the job of the court to develop a party's argument. Likewise, the Supreme Court of the United States does not address issues not raised in

a substantive manner in the lower courts. Because the issue was not raised in a substantive manner, this Court should deny the Petition for Writ of Certiorari as to the standard of proof.

The Act does not apply to this case to the extent the City and its employees were involved. The City's police officers arrested Blake Tucker because of his violent behavior and Odis Tucker was arrested because the officers believed he was about to interfere with their attempt to arrest Blake. The Act does not apply to an in-the-field arrest in which the scene has not yet been secured and the safety of the officers and others is at stake. The district court and the court of appeals held that the Act does not apply under these circumstances. The Tuckers do not raise this as an issue in their petition.

According to the Tuckers there is a split in the circuits as to whether the effectiveness of the auxiliary aid is a question of fact or law. But the court need not reach this issue because it was correctly decided by the courts below. Just because it is a question of fact does not mean it cannot be resolved at the summary judgment stage. If the facts are such that a reasonable jury could reach only one conclusion, then even factual questions can be resolved by the court. The facts of this case establish that the written communications were effective enough for the Tuckers to be on their way home, but for Blake Tucker's criminal behavior. Therefore, this Court need not resolve the issue of whether the effectiveness of

the auxiliary aid is a question of fact, or of law; either way, the issue was correctly decided.

Respectfully submitted,

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